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In the Supreme Court of the United States

RICHARD E. GLOSSIP, ET AL.,
Petitioners,

v.

KEVIN J. GROSS, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF THE ADVOCATES FOR HUMAN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where:

   (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, comalike unconsciousness, and

   (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious?

2. Does the *Baze*-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in *Baze*?

3. Must a prisoner establish the availability of an alternative drug formula even if the state's lethal-injection protocol, as properly administered, will violate the Eighth Amendment?

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INTEREST OF THE AMICUS[1]

The Advocates for Human Rights (The Advocates), established in 1983, is a volunteer-based nongovernmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates has engaged in issue-specific advocacy opposing capital punishment for many years, and in 1991 it adopted a formal commitment to oppose the death penalty worldwide, organizing a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates serves on the Steering Committee of the World Coalition Against the Death Penalty. The Advocates is opposed to the death penalty and has a strong interest in ensuring that as long as capital punishment is practiced in the United States, execution methods conform to international human rights standards.

SUMMARY OF ARGUMENT

Oklahoma's experimental use of the drug midazolam in its lethal injection protocol creates a substantial risk that Petitioners will be subjected to unnecessary suffering, in violation of the Eighth Amendment to the U.S. Constitution as interpreted in light of international law as a reflection of our

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[1] Amicus states that no party or their counsel has authored this Brief in whole or in part nor has any person or entity other than amicus and its counsel made monetary contributions to its preparation. All parties have consented to the filing of this Brief, and letters of consent have been lodged with the Clerk of the Court.

"evolving standards of decency." U.S. Const. amend. VIII; *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Oklahoma's execution methods violate international human rights law in two respects. First, international human rights law requires that, when governments conduct executions, those executions are carried out in a manner that results in the minimum possible suffering. Second, international human rights law prohibits medical or scientific experimentation on prisoners, and Oklahoma's novel protocol amounts to such experimentation.

This Court's decision in *Baze v. Rees* relied on an assurance that a prisoner would be properly anesthetized before the administration of the two subsequent and indisputably pain- inducing drugs. *See Baze v. Rees*, 553 U.S. 35, 53 (2008). Oklahoma, under its new protocol, cannot provide that assurance. As Petitioners demonstrate, the protocol as written is experimental. It employs midazolam as an anesthetic agent, yet that drug is not approved for use nor is it used as a stand-alone anesthetic in stimulating medical procedures. Nor has the U.S. Food and Drug Administration (FDA) approved its use on humans for purposes of a stand-alone anesthetic in surgical procedures. Moreover, midazolam has not been proven to reliably render individuals unconscious. States' unscientific trial-and-error process of assessing the effectiveness of midazolam as an anesthetic in lethal injection protocols is experimental, and its administration is known to result in a substantial risk of unnecessary suffering.

This Court has consistently recognized international law and standards as persuasive

sources of authority to determine what conduct constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment. The Advocates for Human Rights respectfully urges the Court to consider international human rights standards in assessing the constitutionality of Oklahoma's proposed lethal injection protocol. Oklahoma's lethal injection protocol is experimental and poses a substantial risk of unnecessary suffering. As such, the protocol violates the Eighth Amendment's prohibition against "cruel and unusual punishment" as reflected in the international prohibitions against non-consensual human experimentation and execution methods that cause unnecessary suffering.

ARGUMENT

I. Oklahoma's lethal injection protocol violates international law.

By using midazolam as the anesthetic in its lethal injection protocol, Oklahoma is subjecting Petitioners to medical or scientific experimentation in a manner that fails to minimize their risk of suffering, in violation of the United States' obligations under international human rights law. By ratifying both the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85 (ratified by the United States on Oct. 21, 1994) [hereinafter "Torture Convention"] and the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (ratified by the United States

on June 8, 1992) [hereinafter "ICCPR"], the United States joined most countries around the world[2] in recognizing that torture and cruel, inhuman, and degrading treatment or punishment, including execution methods that cause avoidable suffering, as well as non-consensual medical or scientific experimentation on human beings, violate fundamental human rights. International law, as reflected in these two treaties, provides strong persuasive authority for interpreting the constitutional issues before this Court.

A. Oklahoma's proposed lethal injection protocol fails to minimize the risk of suffering to Petitioners, in violation of the ICCPR and the Torture Convention.

Oklahoma's proposed lethal injection protocol violates the United States' obligations under the Torture Convention and the ICCPR, treaties signed and ratified by the United States, because midazolam will not induce the comalike state of unconsciousness necessary to minimize the suffering that Petitioners will experience during their executions.

International human rights law requires that executions be carried out in a manner that inflicts the minimum possible suffering. In 1984, for example,

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[2] As of March 13, 2015, one hundred fifty-seven states were parties to the Torture Convention, and one hundred sixty-eight states were parties to the ICCPR. Status of Ratification Interactive Dashboard, Office of the High Commissioner for Human Rights, United Nations, *available at* http://indicators.ohchr.org/ (last visited March 13, 2015).

the United Nations Economic and Social Council adopted a resolution establishing safeguards guaranteeing protection of the rights of individuals facing the death penalty. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, E.S.C. Res. 1984/50, annex, 1984 U.N. ESCOR Supp. (No. 1), U.N. Doc. E/1984/84 (1984) [hereinafter "Safeguards"]. The Safeguards recognize that "[w]here capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering." *Id.*, para. 9. The ICCPR and the Torture Convention—treaties the United States ratified in 1992 and 1994 respectively—reaffirm this standard under international human rights law.

Article 7 of the ICCPR prohibits both torture and cruel, inhuman, or degrading treatment or punishment, including executions resulting in unnecessary suffering. In interpreting Article 7, the Human Rights Committee—the body tasked with monitoring treaty compliance by governments that have ratified the ICCPR—has stated that the death penalty, if practiced, must "be carried out in such a way as to cause the least possible physical and mental suffering."[3] Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and

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[3] General Comment 20 thus aligns ICCPR's prohibitions on torture and non-consensual scientific and medical experimentation on human beings with the human rights standards espoused by the Safeguards. *See* Safeguards, para. 9. The Human Rights Committee's General Comments "are considered to be the most authoritative interpretation of the Covenant's provisions." Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary (2d Rev. Ed.) (2005), at XXII [hereinafter "Nowak"].

General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994), *available at* http://www1.umn.edu/humanrts/gencomm/hrcom20.htm (last visited March 10, 2015). [hereinafter "General Comment 20"]. Any execution protocol that causes unnecessary suffering therefore violates Article 7 of the ICCPR. For example, the Human Rights Committee has established that execution by stoning or by gas asphyxiation constitutes cruel and inhuman treatment.[4]

Like the ICCPR, the Torture Convention prohibits execution methods that inflict more than the minimum possible suffering. The Torture Convention "promote[s] universal respect for, and observance of, human rights and fundamental freedoms" by memorializing the principle that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[5] Torture

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[4] Nowak at 164, 171 (citing *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994) § 16.3-.4).

[5] The Torture Convention entered into force in accordance with its terms on June 26, 1987. *See* Torture Convention. The Torture Convention was drafted to build upon and reinforce the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a prior United Nations effort to develop international human rights standards defining and prohibiting torture. United Nations Audiovisual Library of International Law, *Introductory Note*, Hans Danelius, Codification Division, Office of Legal Affairs, United Nations, *available at* http://legal.un.org/avl/ha/catcidtp/catcidtp.html (last visited March 10, 2015). In particular, the Torture Convention strengthened and refined the Declaration's definition of torture and established the Committee against Torture to monitor and

Convention, pmbl. The United States played a key role in the treaty's negotiations and pressed for the inclusion of the latter provision, prohibiting cruel, inhuman, and degrading treatment or punishment, in addition to the prohibition on torture. Ahcene Boulesbaa, The U.N. Convention on Torture and the Prospects for Punishment (1999), at 6 [hereinafter "Boulesbaa"]. Parties to the Torture Convention also must take steps "to prevent acts of cruel, inhuman or degrading treatment or punishment" by public officials, even if those acts do not rise to the level of torture. Torture Convention, art. 16(1).

The Committee against Torture, the body of experts responsible for monitoring implementation of the Torture Convention, interprets these obligations to mean that execution methods must "prevent pain and prolonged suffering," and must "inflict the minimum possible suffering," consistent with the Safeguards. Committee against Torture, "Concluding observations on the combined third to fifth periodic reports of the United States of America," UN Doc. CAT/C/USA/CO/3-5, December 19, 2014, para. 25 [hereinafter "CAT Concluding Observations"]; Safeguards, para. 9.[6]

Oklahoma's protocol violates the "minimum possible suffering" standard. The protocol calls for

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assess the implementation of the Torture Convention in the countries that became parties to it. *Id.*

[6] The Safeguards cited approvingly by the Committee against Torture were approved by Economic and Social Council resolution 1984/50 of 25 May 1984, approximately four years before the United States became a signatory to the Torture Convention, and approximately ten years before the United States ratified the Torture Convention.

three drugs to be administered sequentially. Oklahoma first injects midazolam in an effort to anesthetize the prisoner to the pain and suffering that the second and third drugs of the protocol will undeniably cause. The second drug in the protocol paralyzes—and eventually suffocates—the prisoner. Finally, Oklahoma injects the prisoner with potassium chloride, inducing cardiac arrest. Pet'rs' Br. at 2.

Medical professionals do not use midazolam as a stand-alone anesthetic for painful surgical procedures. Nor has the FDA approved midazolam for use as a stand-alone anesthetic; clinical trials show that persons rendered unconscious by midazolam can be "jolted into consciousness" by the infliction of pain. *Id.* at 13. For these reasons, as Petitioners demonstrate, midazolam is inherently incapable of reliably inducing and maintaining the deep, comalike unconsciousness caused by barbiturates such as sodium thiopental and pentobarbital, which shield the prisoner from the painful effects of the second and third drugs in the protocol. *Id.* at 2-3.

The recent botched executions in Arizona, Ohio, and Oklahoma have borne out midazolam's ineffectiveness as an anesthetic in lethal injection protocols. *Id.* at 20-21. During these executions, all three condemned prisoners struggled and, in at least one case, appeared to regain consciousness after the administration of midazolam. All three condemned prisoners apparently experienced excruciating pain. *See id.* These results are fundamentally incompatible with the United States' obligations under the Torture Convention and the ICCPR to minimize the risk of suffering.

In its recent periodic review of the United States' compliance with the Torture Convention, the Committee against Torture expressed concern regarding these recent botched executions because reports suggested the prisoners had experienced preventable suffering. The Committee cautioned the U.S. government that execution methods must be "carried out so as to inflict the minimum possible suffering" and "expresse[d] concern at reported cases of excruciating pain and prolonged suffering that procedural irregularities have caused condemned prisoners in the course of their execution." CAT Concluding Observations, para. 25. The Committee was "specially troubled" by the recent botched executions in Arizona, Oklahoma, and Ohio—all involving lethal injection protocols that used midazolam—and urged the United States to "review its execution methods in order to prevent pain and prolonged suffering," in line with internationally recognized safeguards guaranteeing minimum possible suffering. *Id.*; Safeguards, para. 9.[7]

As a party to the Torture Convention and the ICCPR, the United States has agreed to take effective legislative, administrative, judicial, or other measures to prevent acts of torture and cruel, inhuman, or degrading punishment within its jurisdiction. Torture Convention, arts. 2, 16(1); ICCPR, arts. 2(1), 7. Oklahoma must therefore refrain from using execution protocols that inflict

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[7] The Committee invoked paragraph nine of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which requires that "where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering." Safeguards, para. 9.

preventable pain upon the condemned. Because Oklahoma's lethal injection protocol is likely to inflict more than the minimum possible suffering upon Petitioners, Oklahoma's protocol violates the United States' obligations under the ICCPR and the Torture Convention.

B. Oklahoma's proposed lethal injection protocol constitutes non-consensual human experimentation prohibited under the ICCPR.

By using midazolam as a stand-alone anesthetic in its lethal injection protocol—a use never employed in the medical community and a purpose for which the FDA has not approved the drug—Oklahoma violates the ICCPR's prohibition against non-consensual medical or scientific human experimentation. Respondent has cited no scientific support for the use of midazolam as a safe, effective anesthetic in procedures resulting in pain akin to that imposed during the lethal injection process. Accordingly, its use is experimental, and because such use would result in a risk of pain and suffering, that use violates the ICCPR's prohibition on non-consensual medical and scientific experimentation. Indeed, the Human Rights Committee, in response to concerns about the safety and efficacy of drugs used in lethal injections across the country, recently urged the United States to "ensure that lethal drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration." Human Rights Committee, "Concluding observations on the fourth periodic report of the United States of America," UN Doc.

CCPR/C/USA/CO/4, April 23, 2014, para. 8 [hereinafter "ICCPR Concluding Observations"].

The ICCPR's prohibition against torture and cruel, inhuman, or degrading punishment includes a provision expressly prohibiting experimentation on non-consenting human beings: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, *no one shall be subjected without his free consent to medical or scientific experimentation.*" ICCPR, art. 7 (emphasis added).

The ICCPR does not otherwise define torture or cruel, inhuman, or degrading treatment or punishment; human experimentation is the single example the treaty provides.[8] Some government representatives involved in drafting the prohibition suggested that "improper medical or scientific experimentation was implicitly prohibited in the first clause" of Article 7, but "[i]t was finally agreed that the matter was so important to require a specific provision, even at the risk of repetition." Marc J. Bossuyt, Guide to the "*Travaux Preparatoires*" of the

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[8] The governments that drafted Article 7's specific prohibition on non-consensual human experimentation introduced the provision in response to the atrocities committed against prisoners in Nazi concentration camps. Nowak, at 188. The Nazis conducted "a series of unprecedented, gruesome medical experiments on concentration camp inmates," including, for example, exposing inmates to malaria, mustard gas, jaundice, and spotted fever, and removing sections of bones, muscles, and nerves and transplanting them to other inmates. Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275, 287 (1994).

International Covenant on Civil and Political Rights (1987), at 151-152 [hereinafter "Bossuyt"]. The United States joined other UN member-states in supporting the addition of this provision.[9]

The prohibition extends to "experiments that by their very nature are to be deemed torture or cruel, inhuman or degrading treatment." Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary (2d Rev. Ed.) (2005), at 191 (emphasis removed). In that context, the Human Rights Committee concluded that forced injections of a prisoner are inhuman under the meaning of Article 7. *Id.* at 192 (citing *Viana Acosta v. Uru.*, Comm. 110/1981, U.N. Doc. A/39/40, at 169 (HRC 1984), §§ 2.7, 14–15).

Scientific evidence does not support midazolam's effectiveness as a stand-alone anesthetic for painful procedures. Oklahoma does not identify any substantial body of scientific research supporting the use of midazolam for this purpose or show that a medical consensus supports such use. Moreover, the FDA has not approved midazolam for use as a stand-alone anesthetic in painful procedures; nor does other scientific research or medical consensus support such use. Accordingly, its use in this case is experimental and will result in a risk of suffering in violation of Article 7 of the ICCPR.

By using midazolam as a stand-alone anesthetic in its lethal injection protocol, Oklahoma embarks on an intolerable human experiment in

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[9] In expressing its support, the United States proposed exceptions for "[e]mergency operations undertaken to save the life of [a] patient, where the patient is unable to give his consent" and for compulsory vaccinations. Bossuyt, at 151-152.

violation of international human rights standards. The FDA's oversight and approval process provides guidance as to what makes a particular drug use experimental. The FDA requires a rigorous and evidence-based review of a drug's safety and efficacy before the drug may obtain FDA approval. How Drugs are Developed and Approved, U.S. Food and Drug Administration, *available at* http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ default.htm (last visited March 10, 2015). [hereinafter "FDA: How Drugs are Developed and Approved"]. Even before seeking FDA approval, a drug company must conduct its own scientific testing to demonstrate the drug's safety and efficacy to the FDA. Development & Approval Process (Drugs), U.S. Food and Drug Administration, *available at* http://www.fda.gov/Drugs/DevelopmentApprovalProcess/default.htm (last visited March 10, 2015) [hereinafter "FDA: Development & Approval"]. Before any human testing takes place, a drug company first conducts laboratory and animal tests to assess the drug's safety and efficacy. *Id.* FDA doctors, scientists, pharmacologists, and statisticians then subject these test results to exhaustive review before the FDA approves the drug for its intended use. FDA: How Drugs are Developed and Approved. The FDA's comprehensive, methodical drug screening process "not only prevents quackery, but also provides doctors and patients the information they need to use medicines wisely." FDA: Development & Approval. The unapproved use of an approved drug poses serious risks because "the makers of the drugs have not put them through the formal, lengthy, and often

costly studies required by FDA to officially approve the drug for new uses." Understanding Investigational Drugs and Off Label Use of Approved Drugs, U.S. Food and Drug Administration, *available at* http://www.fda.gov/forpatients/other/offlabel /default.htm (last visited March 10, 2015).[10] Such "off-label" uses must be subject to a rigorous informed consent procedure. *See, e.g.*, Zain Mithani, *Informed Consent for Off-Label Use of Prescription Medications*, Op-ed., 14 Am. Med. Ass'n J. Ethics 576 (2012). As noted below, however, international human rights law recognizes that no such consent can be forthcoming from a prisoner.

Oklahoma's use of midazolam as a stand-alone anesthetic is quintessentially the "quackery" that the FDA approval process intends to prevent, further demonstrating that the protocol constitutes human experimentation. *See* FDA: Development & Approval. Oklahoma alleges that ostensibly successful executions of condemned prisoners in Florida, as well as of one prisoner in Oklahoma, using Oklahoma's favored lethal injection protocol support the conclusion that the protocol is not experimental. Br. in Opp'n. to Pet. Writ. Cert., January 14, 2015, at 4; Resp. to Pet'rs' Appl. for Stays of Execution, January

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[10] While there are some instances in which off-label drugs are used, off-label use is sanctioned by the FDA only when it is done for a valid medical purpose and is based on "firm scientific rationale and on sound medical evidence." "Off-Label" and Investigational Use Of Marketed Drugs, Biologics, and Medical Devices Information Sheet, U.S. FOOD AND DRUG ADMINISTRATION, *available at* http://www.fda.gov/RegulatoryInformation/Guidances/ucm126486.htm (last visited March 13, 2015). Respondent has not met this standard.

14, 2015 at 3; Resp'ts' Appl. for Stays of Execution of Sentences of Death, filed January 26, 2015, at 3. Yet the administration of a paralytic drug in these protocols effectively masks to observers any suffering a prisoner might be enduring. It is therefore inappropriate to conclude, as any sort of quasi-experimental finding, that the prisoners did not suffer during their executions. Further, these executions that Oklahoma offers as evidence were not designed to test the effectiveness of midazolam as an anesthetic for lethal injections. These executions present nothing more than a series of anecdotes; they do not serve as scientific data that would render Oklahoma's planned executions of Petitioners non-experimental.

The Human Rights Committee has recognized that any medical or scientific experimentation performed on persons "under any form of detention or imprisonment" is inherently coercive and hence non-consensual. General Comment 20, para 7. The Committee further acknowledged that incarcerated "persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health." *Id. A fortiori*, such individuals should not be subjected to medical or scientific experimentation that will inevitably result in death. Article 7 thereby directs that Petitioners cannot be subjected to medical or scientific experimentation because their status as prisoners vitiates their ability to grant valid consent to such experimentation.

The Human Rights Committee recently encouraged the United States to take measures to monitor lethal injection protocols and to ensure that the protocols use only drugs that have been deemed

reliable for the purposes for which they are used in the lethal injection procedure. The Human Rights Committee specifically expressed concern regarding "reports about the administration, by some states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs. " ICCPR Concluding Observations, para. 8. The Committee suggested that execution practices such as those Oklahoma endorses violate Article 7 of the ICCPR, among other provisions of the treaty. The Committee recommended that the United States "[e]nsure that lethal drugs used for executions originate from legal regulated sources, and are approved by the FDA and that information on the origin and composition of such drugs is made available to individuals scheduled for execution. " *Id.* Midazolam is not FDA-approved for use as a stand-alone anesthetic, and therefore cannot meet this standard.

The ICCPR requires governments that have ratified the treaty to implement human rights standards that are consistent with the treaty's mandates. ICCPR, art. 2. Oklahoma's continued use of its current lethal injection protocol amounts to scientific or medical experimentation on prisoners, in violation of the United States' international law obligations under Article 7 of the ICCPR.

II. International law provides persuasive authority for interpreting the constitutional issues before this Court.

This Court has long recognized international law as a persuasive source of authority for questions arising under the U.S. Constitution and has often looked to international and comparative law and practice in its analysis of the Eighth Amendment's prohibition against cruel and unusual punishment. U.S. Const. amend. VIII. Whether a punishment is "cruel and unusual" is a determination informed by "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. at 101. In *Roper v. Simmons*, this Court held that execution of individuals for crimes committed as juveniles is a disproportionate punishment that violates the Eighth Amendment. In reaching its decision, the Court looked "to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (citing *Trop*, 356 U.S. at 102-103). More recently, in *Graham v. Florida*, the Court affirmed the relevance of international law to the proper interpretation of the Eighth Amendment. In its analysis of the constitutionality of Florida's juvenile life without parole policies, the Court examined the practices of other countries in sentencing juveniles, continuing the Court's "longstanding practice in noting the global consensus against the sentencing practice in question." *Graham v. Florida*, 560 U.S. 48, 80 (2010). The Court noted that even in the absence of on-point international law binding on the United States, international law, agreements, and practices are "relevant to the Eighth Amendment ... because the judgment of the world's nations that a particular

sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Id.* at 82.

Significantly, with regard to the constitutional issues here, this Court has consulted and cited international authorities and the practices and decisions of other nations in assessing whether domestic practices comport with evolving standards of decency in the treatment of condemned prisoners.[11] International law and practice are particularly relevant in this case in light of the legal obligations binding on the United States, which prohibit non-consensual medical and scientific experimentation on prisoners and methods of execution that cause unnecessary suffering, in violation of the prohibition on cruel, inhuman, or degrading punishment.

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[11] *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002), (examining the opinions of "the world community" to support its conclusion that execution of persons with severe intellectual disabilities would offend the standards of decency required by the Eighth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (Stevens, J.) (looking to the opinions and practices of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to the proper interpretation of the Eighth Amendment). This Court has also found international law relevant to the interpretation of other constitutional provisions. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (referencing a decision of the European Court of Human Rights to determine that a Texas sodomy law violated plaintiff's privacy rights under the due process clause of the Fourteenth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring, joined by Breyer, J.) (noting that the Court's opinion with regard to affirmative action "accords with the international understanding of the office of affirmative action" reflected in four international treaties).

The ICCPR and the Torture Convention reflect the collaborative efforts of international human rights experts—with leadership from representatives of the United States[12]—to develop standards that will help maturing societies to build and maintain strong human rights practices. Those standards include prohibitions on torture and cruel, inhuman, and degrading treatment or punishment, as well as on non-consensual scientific and medical experimentation on human beings. Oklahoma's lethal injection protocol fails to comply with the human rights standards recognized in the ICCPR and in the Torture Convention, and therefore offends the evolving standards of decency that the United States recognized when it ratified those treaties.

CONCLUSION

Oklahoma's lethal injection procedure does not comply with international human rights standards that require that executions be performed with the minimum possible suffering and that governments refrain from non-consensual medical experimentation on human beings. The recent botched executions of Clayton Lockett, Joseph Wood, and Dennis McGuire, who visibly struggled and in the case of Lockett appeared to regain consciousness following the administration of midazolam, and who apparently experienced excruciating pain, illustrate the substantial risk of relying on midazolam as a stand-

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[12] *See, e.g.*, Boulesbaa, at 6, 20, 25 (describing the United States' role in the UN Human Rights Commission's Working Group tasked with drafting the Torture Convention); Jeffrey L. Dunoff et al., International Law Norms, Actors, Process: A Problem-Oriented Approach (3d Ed.) (2010), at 436.

alone anesthetic. This Court should consider the provisions of treaties that the United States has ratified and the views of their respective treaty monitoring bodies in determining whether Oklahoma's protocol can survive *Baze*'s rigorous constitutional scrutiny.

To proceed with executions using Oklahoma's lethal injection protocol offends the "evolving standards of decency" expressed by the treaties and endorsed by the many governments that are parties to those treaties. Because the United States has ratified the Torture Convention and the ICCPR, it has an obligation to exercise its moral authority to respect and strengthen the standards of decency they embody.

To assert that these international human rights standards are irrelevant to this Court's analysis would undermine the United States' important leadership in recognizing the standards of decency embodied in the Torture Convention and the ICCPR. When the United Nations General Assembly adopted the Torture Convention by consensus in 1984, U.S. representative to the UN Commission for Human Rights Richard Schifter praised the vote as a "significant achievement" demonstrating that "[i]t is no longer acceptable, in the eyes of the international community, for a government to claim that the way it treats its own citizens is solely an internal matter if the treatment in question violates the provisions of international instruments which set human rights standards." U.N. GAOR, 38th Sess., 93d plan. Mtg., at 1667, U.N. Doc. A/39/PV.93 (1984).

Human rights law forbids execution methods that result in unnecessary suffering as well as any

form of medical or scientific experimentation on prisoners. Allowing Oklahoma to proceed with its protocol for executing Petitioners is inconsistent with the United States' obligations under international human rights law as provided by the ICCPR and the Torture Convention.

For the foregoing reasons, the Court should find Respondents' proposed protocol unconstitutional under the Eighth Amendment and reverse the decision of the U.S. Court of Appeals for the 10th Circuit.

Respectfully submitted,

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